Supreme Court, U.S.
FILED

No. 001822 APR - 4 2001

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In The

Supreme Court of the United States

MARY LYNOM, Lt. Colonel,

Petitioner,

v.

Dr. SHEILA E. WIDNALL; DONALD W. SHEPPERD; CRONIN H. BYRD; C. BRUCE BRASWELL; DOUGLAS J. HEADY; JOHN H. LYNSKEY; ALBERT BUNTING; JOE G. LINEBERGER, SAF/MIB, individually and officially; DAVID SCOBEY, Colonel, ANG PME/CC; WILLIAM F. BLAND, Major General; PHILLIP KILLEY, Major General; and JOHN CONAWAY, Lt. General;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

SUPPLEMENTAL APPENDIX

JAMES R. KLIMASKI*
LYNN I. MILLER
KLIMASKI & GRILL, P.C.
1400 K Street NW
Suite 1000
Washington, DC 20005-2403
202-296-5600

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAJOR MARY LYNOM, Plaintiff, v. SHEILA WIDNALL, *et al.*, Defendants.	Civil Action No. 95-0233 (EGS)

MEMORANDUM OPINION & ORDER

(Filed Sep. 17, 1998)

This case is before the Court on defendants' motion to dismiss or, in the alternative, for summary judgment and on plaintiff's motion for partial summary judgment. Upon consideration of defendants' motion and plaintiff's motion, defendants' motion is **GRANTED IN PART and DENIED IN PART** and plaintiff's motion is **GRANTED.**

I. FACTS

Plaintiff Mary Lynom is now a Lieutenant Colonel in the Air National Guard (ANG) of the United States Air Force. Plaintiff alleges that beginning in 1981, her superiors at ANG subjected her to a pattern of sexual harassment. In 1981, Colonel John Lednek, Deputy Commander of the ANG Readiness Center repeatedly made unwanted sexual overtures toward plaintiff. Plaintiff alleges that, upon reporting these incidents, her superiors told her that sexual favors were the norm in the ANG, particularly

if a female officer desired professional advancement. From 1981 through 1984, plaintiff claims that defendant Bunting supervised and encouraged sexual harassment and misconduct throughout the ANG. Defendant Bunting urged female officers to become "Bunting Bunnies" at parties in which they offered sexual favors.

The plaintiff states that her refusal to become one of these "Bunting Bunnies" hindered her advancement in the ANG. After being selected for a prestigious training program in Alabama and successfully completing the program, the plaintiff returned to D.C. to work again under the defendants who allegedly had sexually harassed her. Upon her return, the defendants refused to give plaintiff the promotions and assignments she believed she deserved. In 1987, during the period of her return, defendant Bunting again solicited sexual favors. Again, plaintiff reported the incidents, and once again the defendants failed to take action to investigate plaintiff's allegations.

In January 1988, defendant Bunting persuaded the plaintiff to move to Arkansas to secure a position in Personnel. Plaintiff relied on the defendant's representations, incurred expenses in selling her home and moved to Arkansas – only to find that the position in fact had already been filled by someone in the Arkansas ANG. Following this treatment, plaintiff successfully petitioned Senator Barbara Mikulski to initiate a Congressional inquiry into plaintiff's treatment. Defendant Conaway then persuaded plaintiff to meet with him and reassured her that the ANG would look into her complaints. Defendant Conaway persuaded plaintiff to withdraw her request for a Congressional inquiry. Plaintiff alleges that

after she withdrew the inquiry, she suffered retaliation once again – this time in the form of a downgrade in her Officer Effectiveness Report.

Plaintiff further claims that in 1989, after seven years of stress and abuse, her health began to deteriorate. She suffered from back spasms, sciatic nerve pain and stomach disorders. Later that year, plaintiff again met with defendant Conaway to complain about harassment and discrimination against her. At that time, plaintiff requested a tour, promotion, removal of unfavorable ratings in her file and an end to the ongoing harassment. Conaway admitted to plaintiff that someone "had it in for her" and told plaintiff that he would initiate an investigation of her allegations.

LTC Curtis Griffith was assigned to investigate plaintiff's case. Griffith filed a report which concluded that, in fact, plaintiff had been a victim of sexual harassment and retaliation at the ANG. Plaintiff filed a FOIA request seeking a copy of the report from the ANG but was told that the report was not available. Plaintiff maintains that, with defendant Conaway's knowledge and consent, the defendants altered the report while it was being prepared for release. Defendants allegedly falsified the report such that it incorrectly concluded that the defendants had not inflicted any sexual harassment or other wrongdoing upon plaintiff. Griffith refused to sign the altered report but defendant Byrd did sign the altered report.

Plaintiff alleges that further retaliation ensued. Defendant Conaway appointed a Recommendation/ Review Panel to "evaluate Major Lynom." Defendant Byrd, who had altered the report to mask the findings of

harassment, chaired the panel. The panel made adverse determinations regarding plaintiff's performance which plaintiff insists were meritless and retaliatory. The defendants denied plaintiff a promotion in light of the findings. Plaintiff further claims defendants did not give her any opportunity to respond to the Panel's findings and that they denied her access to all documents and correspondence made by this panel.

On October 1990, plaintiff received a copy of LTC Griffith's report but, in the copy, an overwhelming majority of the report's text was blackened out such that no conclusions, findings or explanations were revealed. In 1991, plaintiff received a Notice of Involuntary Tour Curtailment for Cause. In response, plaintiff filed an EEOC complaint with the Equal Opportunity office at the ANG. That office took no action on the grounds that plaintiff's claims allegedly had already been investigated.

On May 8, 1992, plaintiff petitioned the Air Force Board for the Correction of Military Record ("the Board") for reinstatement, promotion to Lieutenant Colonel, back pay, and sanctuary (remaining on active duty until eligible for retirement). The Air Force IG also investigated Lt. Col. Lymon's complaints and prepared a Report of Investigation concluding that "the evidence clearly shows that it is more probable than not that Major Lynom has been treated unfairly." A.R. at 92-101. A summary of this report was sent to the Board.

The Board did not release its decision until October 14, 1993. The Board granted Lt. Col. Lynom only partial relief – back pay and reinstatement to active duty. Colonel Braswell authored a minority report which has been

"lost." Plaintiff commenced this lawsuit to challenge the Board's decision denying her the full relief she requested.

II. DISCUSSION

A. APA Claim

The Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* empowers federal courts to review the final actions of agencies, such as the Board in this case. "Under the APA, a reviewing court may set aside the Board's decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or unsupported by substantial evidence in the administrative record." *Marymount Hosp., Inc. v. Shalala*, 19 F.3d 658, 661 (D.C. Cir. 1994) (citing 5 U.S.C. § 706(2)(A), (E)). The Court finds the Board's decision here to be arbitrary, capricious, and unsupported by substantial evidence in the administrative record.

The Board found that "while we cannot conclusively determine whether or not [plaintiff] was discriminated against, . . . the evidence clearly shows that she was treated unfairly." Board's Report, at 4, 5. The Board went on, however, to deny plaintiff's request that she receive a promotion to Lieutenant Colonel. The Board stated:

> The only way for an ANG officer to be promoted prior to meeting the mandatory requirements for promotion[1] is to receive a position vacancy promotion. We note that this program is

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[1] Plaintiff's counsel has conceded that plaintiff did not satisfy the mandatory requirements for promotion to Lieutenant Colonel.

> designed to provided officers who have demonstrated high potential and exceptional abilities with the opportunity for accelerated promotion. These promotions must be reserved for those truly few outstanding officers. The evidence before this Board does not reveal that the applicant's performance and potential warrants promotion to lieutenant colonel. In addition, and most importantly, we find no evidence to suggest that she had been nominated for consideration under this program.

Board's Report, at 5.

Yet the evidence before the Board does not support this conclusion. First, the Administrative Record which was before the Board contains document after document in which plaintiff was uniformly praised by her superiors. Second, and most importantly, there was evidence before the Board that plaintiff had been nominated by her supervisor for a promotion to Lieutenant Colonel. *See* Administrative Record (A.R.) at 98.

By way of example, on November 2, 1981, defendant Bunting (then Colonel) wrote that "Captain Lynom is an outstanding and dedicated officer." A.R. at 208. On that same date, Brigadier General Wess P. Chambers wrote that "Captain Lynom has willingly accepted a variety of assignments specifically intended as career broadening. Her actions have improved our recruiting efforts and have been a credit to the National Guard. She is a valued member of our staff." *Id.*

Furthermore, defendant Bunting (then Colonel) wrote on April 16, 1985 that "Captain Lynom has displayed exceptional skill. . . . She has great potential for

continued professional development and advancement. Recommend promotion now." *Id.* at 198. Brigadier General John McMerty wrote on November 7, 1986 that Lt. Col. Lynom was "always thorough and concise in her work. . . . Promote." *Id.* at 193. Similarly, on June 3, 1987, Brigadier General Frank Willis wrote that "Major Lynom is a true professional officer; promote to lieutenant colonel in a unit vacancy." *Id.* at 191. Finally, in March 1989, the administrative record shows that plaintiff's immediate supervisor, Lt. Col. Carroll, impressed by plaintiff's performance, requested an additional officer position be created and that plaintiff be promoted to that position. A.R. at 98; *see also* Compl. at ¶¶ 32-33.

Thus, the Court finds the decision of the Board was arbitrary and capricious. *See Frizelle v. Slater*, 111 F.3d 172, 178-79 (D.C. Cir. 1997) (using plaintiff's outstanding evaluations to hold that board's decision not to strike or redact negative evaluation was arbitrary and capricious). The Court remands for the Board to reconsider its decision denying plaintiff the full relief she requested. If the Board again denies full relief to Lt. Col. Lynom, the Board must carefully explain such a decision in light of the overwhelming evidence in the administrative record of plaintiff's outstanding performance.

B. Constitutional Torts

Defendants have moved to dismiss plaintiff's constitutional tort claims, arguing that they are barred by the so-called *Feres* doctrine. *See Feres v. United States*, 340 U.S 135, 146 (1950). The *Feres* doctrine precludes service members from bringing tort suits against the government for

injuries that "arise out of or are in the course of activity incident to service." *Id.* at 146. The Court finds that plaintiff's complaint indeed arises out of and is in the course of activity incident to her service and thus, is controlled by *Feres* and its progeny. *See United States v. Stanley*, 483 U.S. 669 (1987); *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986); *Chappell v. Wallace*, 462 U.S. 269 (1983). Accordingly, plaintiff's tort claims against the individually named defendants are dismissed.

Moreover, defendants also argue that plaintiff's tort claims against the defendants in their official capacities should be dismissed. Defendants so argue because sovereign immunity bars claims for money damages against officials in their official capacity absent a specific waiver by Congress. *See Library of Congress v. Shaw*, 478 U.S. 310, 314-15 (1986); *United States v. Mitchell*, 445 U.S 535, 538 (1980). There has been no such waiver by Congress here. *See FDIC v. Meyer*, 114 S.Ct. 996, 1001 (1994); *Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994).

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is **GRANTED**; and it is further

ORDERED that this case is remanded to the the [sic] Board to reconsider its decision denying full relief to plaintiff; and it is further

ORDERED that defendant's motion for summary judgment is **GRANTED IN PART and DENIED IN PART**; and it is further

ORDERED that plaintiff's tort claims against the individuals in both their individual and official capacities are **DISMISSED WITH PREJUDICE.**

Date: 9/16/98

/s/ Emmet G. Sullivan
EMMET G. SULLIVAN
UNITED STATES
DISTRICT JUDGE

Notice to:

James R. Klimaski, Esq.
KLIMASKI, MILLER & SMITH
1899 L Street, N.W.
Suite 1250
Washington, D.C. 20036

Bruce R. Hegyi, Esq.
Assistant United States Attorney
Judiciary Center
555 Fourth Street, N.W.
Room 10-832
Washington, D.C. 20001